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ALEXANDER L. STEVAS
CLERK

No. 82-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH P. McCOMBS, Chairman,
Illinois Prisoner Review Board,

Petitioner,

vs.

WILLIAM SCOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines to find a legitimate expectation of release on parole where the Illinois parole statute contains no mandatory language limiting the Illinois Prisoner Review Board's broad discretion to deny parole and where Illinois courts have squarely held that parole under the statute is a matter of executive grace and clemency.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The proceedings in the court below involved the claims of William Scott as Petitioner-Appellant and the Illinois Parole and Pardon Board and Lou Brewer as Respondents-Appellees. These were also the parties in the district court. Mr. Lou Brewer is a former warden with the Illinois Department of Corrections who no longer serves in that capacity and is not a party to this petition. The name of the paroling authority in Illinois was changed by statute, in 1978, from the Illinois Parole and Pardon Board to the Illinois Prisoner Review Board. Joseph P. McCombs is the current chairman of the Illinois Prisoner Review Board.

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JOSEPH P. McCOMBS, Chairman,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit which held that the Illinois parole statute creates a legitimate expectation of parole. *United States of America ex rel. Scott v. Illinois Parole and Pardon Board*, 669 F.2d 1185 (7th Cir. 1982). A copy of the opinion is attached as Appendix A.

On November 11, 1968, the respondent was convicted of murder in the Circuit Court of Cook County, Illinois and

was sentenced to a term of 25 to 40 years in the custody of the Illinois Department of Corrections.

He brought a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois alleging that he had been denied due process in his 1978 parole hearing. His petition was denied when the court found that the Illinois parole statute created no expectation of parole. *United States ex rel. Scott v. Illinois Parole and Pardon Board*, No. 79 C 860 (N.D. Ill. August 27, 1979). A copy of that opinion is attached as Appendix D.

The court of appeals denied the People's petition for rehearing and suggestion for rehearing en banc on June 18, 1982. See Appendix B.

JURISDICTION

The court of appeals' decision was rendered on February 9, 1982. A petition for rehearing was denied June 18, 1982. This petition is being filed within 90 days of the date the court of appeals denied the petition for rehearing as per 28 U.S.C. §2102(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the length of the Statutes and Regulations involved these sections are set out as Appendix N.

STATEMENT OF THE CASE

William Scott (hereinafter referred to as respondent) was convicted of murder in the Circuit Court of Cook County, Illinois on November 11, 1968. He was sentenced to a term of 25-40 years for the stabbing death of a "companion" of his estranged wife. *See People v. Scott*, 52 Ill.2d 432, 288 N.E.2d 478 (1972), *cert. denied*, 410 U.S. 941 (1973). On August 30, 1978, the respondent appeared before the Illinois Prisoner Review Board (formerly the Illinois Parole and Pardon Board and hereinafter referred to as the Prisoner Review Board) for the second time and was denied parole for the following reason:

> The basis for the Board's decision denying you parole at this time is explained as follows:
>
> The above action is taken based on the Board's feeling that release at this time would deprecate the severity of the crime for which you were convicted, namely, Murder, receiving a 25-40 year sentence.

See Appendix E.

Following his 1978 denial, the petitioner applied for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division, alleging that he had been denied parole in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The district court (Decker, J.) considered the petitioner's claim, and a Motion for Summary Judgment filed by respondents, in light of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and found that the "Illinois statute does not

require release on parole but, rather, sets forth instances in which parole shall not be granted." Appendix D at 21a.

The court went on to hold that "Therefore, the court concludes that the Illinois statute creates no expectancy of release on parole which is protected by due process." *United States of America ex rel. William Scott v. Illinois Parole and Pardon Bd.*, No. 79 C 860 (N.D. Ill. August 27, 1979). Appendix D at 21a.

On November 19, 1980, nearly 15 months later, the court of appeals allowed the petitioner to file a *pro se* Brief and Argument, instanter. On December 3, 1980, the court denied petitioner's motion for appointment of counsel. The Brief and Argument for Appellees was filed on January 5, 1981 and a Reply Brief followed on January 20, 1981.

The appellant's main brief dedicated two pages to arguing that the Illinois statute created a liberty expectation. The brief did not mention *Greenholtz* or any Illinois case law. The appellees responded to the argument in one paragraph relying on *Greenholtz* and *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 259 N.E.2d 33 (1970). The appellant replied in a one page argument citing as authority the Constitution of Illinois (1970), art. I, sec. 11.

Just over one year later, on February 9, 1982, the Seventh Circuit rendered the lengthy opinion at issue in this petition. *United States of America ex rel. Scott v. Illinois Parole and Pardon Bd.*, 669 F.2d 1185 (7th Cir. 1982). See Appendix A. There was no oral argument.

The court of appeals found that the Illinois statute can be "[R]easonably read as not creating an expectancy of release on parole" and "can be read as merely a statement by the Illinois legislature as to when the Board must deny

parole, leaving the Board free in the absence of those conditions to exercise its own discretion in deciding whether or not parole can be granted." 669 F.2d at 1189. The court chose, however, not to accept that reading and concluded that the Illinois parole release statute does not create a constitutional liberty interest. 669 F.2d at 1190.

On February 23, 1982, the appellees filed a Petition for Rehearing and Suggestion for Rehearing *en banc*. The appellant was ordered to respond to the petition on March 2, 1982.

On March 3, 1982, Circuit Judge Sprecher "voted" to deny rehearing and rehearing *en banc*. 669 F.2d at 1192. Also on March 3, 1982, the mandate issued from the Seventh Circuit. The mandate was recalled and stayed on motion of the appellees on March 17, 1982, and remains stayed.

On March 23, 1982, the court, *sua sponte*, appointed Professor Gary Palm of the University of Chicago to represent the appellant for the purpose of responding to the petition for rehearing.

On April 28, 1982, the appellees sought leave to cite additional authority in support of the petition. On April 29, 1982, the appellant responded to the petition.

On May 7, 1982, a formal vote was requested on the question of rehearing *en banc*. On May 10, 1982, the court ordered the appellant to respond to the Motion for Leave to Cite Additional Authority.

Judge Sprecher died on May 15, 1982.

On May 19, 1982, the appellant filed objections to the Motion for Leave to Cite Additional Authority.

On May 20, 1982, the vote on rehearing was completed.

On June 18, 1982, the court issued its Order denying the petition. Circuit Judge Posner (recently Professor Posner of the University of Chicago) did not participate in the consideration of the petition. Judge Sprecher's vote of March 3, was counted as a vote to deny the petition. Circuit Judge Coffey filed a dissent addressed to the decision to count Judge Sprecher's vote. 669 F.2d at 1192, 1193.

On June 24, 1982, a corrected Order denying the petition was entered. See Appendix B.

On June 25, 1982, the appellees filed a Motion to Reconsider or in the alternative for disclosure of the vote count and Judge Posner's reason for recusal. The motion was considered by the full court, except—again—Judge Posner, and was denied on July 7, 1982. See Appendix C.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS INTERPRETED THE ILLINOIS PAROLE STATUTE TO CREATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN PAROLE WHICH HAS BEEN CONSISTENTLY REJECTED BY THE COURTS OF ILLINOIS AND IS CONTRARY TO THE INTENTION OF THE ILLINOIS LEGISLATURE AND THE INTERPRETATION OF THE STATUTE BY THE ILLINOIS PRISONER REVIEW BOARD.

In this case, the United States Court of Appeals for the Seventh Circuit has interpreted an Illinois statute in a manner that has been consistently rejected by the courts of Illinois. As a result, the Illinois Prisoner Review Board has been virtually stripped of the discretion to deny parole vested in it by the legislature of Illinois and consistently respected by the Illinois courts. Moreover, this decision has created, potentially, an annual federal cause of action for more than 2,000 Illinois inmates[1]—a cause of action that had previously been rejected by the court of appeals and the district courts on many occasions before this decision.

The statutory provision involved is a section of the Illinois Unified Code of Corrections which was enacted in 1972 and which limits the Illinois Prisoner Review Board's (prior to 1978 the board was called the Pardon

[1] Even though the Mandate has not yet issued in this case, the Illinois Attorney General has been ordered to respond to 28 Petitions for a Writ of Habeas Corpus which have already been filed in the United States District Courts in Illinois relying on *Scott* for the constitutional basis of their claims. *See* 28 U.S.C. §2254. See Appendix L.

and Parole Board) authority to grant parole to certain types of inmates. The provision in pertinent part, reads:

> (c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1981, ch. 38, §1003-3-5(c).

The analysis of any parole statute must begin with this Court's decision in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). In *Greenholtz*, this Court rejected the notion that by holding out the possibility of parole a state creates a constitutional liberty interest in release on parole. Such a possibility of parole, "provides no more than a mere hope that the benefit will be obtained." *Greenholtz*, 442 U.S. at 11. In order for a prisoner to have a constitutionally protected interest in parole, the prisoner:

> [C]learly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Greenholtz, 442 U.S. at 7.

This Court did find such a legitimate expectation of parole in the language of the unique Nebraska parole statute that was involved in *Greenholtz*. That statute provided, in relevant part, that:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it ***shall order his release unless*** it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would deprecate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date. Neb. Rev. Stat. §83-1, 114(1) (1976).

Greenholtz, 442 U.S. at 11. (Footnote omitted; emphasis added).

This Court found that this statute created a "legitimate claim of entitlement" to parole to which the procedural guarantees of due process attached.

The Nebraska statute's mandatory language ("shall order his release unless") was crucial to this Court's decision. *E.g., Connecticut Bd. of Pardons v. Dumschat*, ... U.S. ....., 101 S.Ct. 2460, 2465 (1981); *Averhart v. Tutsie*, 618 F.2d 479, 481 (7th Cir. 1980); *See, Davis v. Ball Memorial Hospital Ass'n*, 640 F.2d 30, 39 (7th Cir. 1980) (stating that mandatory parole eligibility was determinative in *Greenholtz*); *Boothe v. Hammock*, 605 F.2d 661, 664 (2nd Cir. 1979) ("The [*Greenholtz*] majority could not have called the Nebraska scheme 'unique' if it believed that it resembled the statutes of the 47 other states that identify, as relevant to parole decision-making, the same factors mentioned in the Nebraska statute. The 'shall/unless' formula was decisive for the Court.").

In every reported decision known to counsel in which a court considered whether a parole system created a constitutional liberty interest under *Greenholtz*, the presence or absence of mandatory language *assuring parole* was held determinative.

In only three cases has a court, properly applying the *Greenholtz* test, found such a liberty interest. The Eighth Circuit Court of Appeals found a liberty interest in the Missouri parole system in *Williams v. Missouri Bd. of Probation and Parole*, 661 F.2d 697 (8th Cir. 1981) and in the federal parole system in *Evans v. Dillahunty*, 662 F.2d 522 (8th Cir. 1981). The Missouri parole statute provided:

> When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the *board shall release* on parole any person confined in any correctional institution administered by state authorities.

Williams, 661 F.2d at 698. (Emphasis added).

The Eighth Circuit concluded that "the Missouri law providing that *when* the statutory guidelines are met the inmate *shall* be released on parole gives rise to the same protectible entitlement as the Nebraska scheme . . . ." *Williams*, 661 F.2d at 699. (Emphasis in original).

In *Evans*, the Eighth Circuit found that the very similar mandatory provisions in the federal parole statute also gave rise to a constitutional liberty interest. *Evans*, 662 F.2d at 526. The federal statute was also considered in *Bowles v. Tennant*, 613 F.2d 776 (9th Cir. 1980). While not actually deciding the issue, and with some reservations, that court suggested that the federal statute's mandatory language might meet the *Greenholtz* test. *Bowles*, 613 F.2d at 778.

On the other hand, on numerous post-*Greenholtz* occasions, federal courts have considered state parole systems and found that they did not create a liberty interest because they lacked the mandatory character peculiar to the Nebraska and federal statutes. As the Tenth Circuit Court of Appeals noted in 1981, prior to the *Williams* decision:

> Nebraska's "shall . . . unless" system appears to be quite unusual. Although the federal system is similar, [citing *Bowles*] no other state system which has been the subject of a circuit court opinion has been found to be enough like Nebraska's to establish a liberty interest.

Candelaria v. Griffin, 641 F.2d 868 (10th Cir. 1981).

The Seventh Circuit considered the Indiana parole system in *Averhart v. Tutsie*, 618 F.2d 479 (7th Cir. 1980). Because "the sufficiency of the claim of entitlement must be decided by reference to state law", *Averhart*, 618 F.2d at 482 (quoting *Bishop v. Wood*, 426 U.S. 341, 344 (1976)), the court accepted the "authoritative interpretation" of the Indiana statute given by the Indiana Supreme Court. That court had held:

> Our parole release statute *creates no expectancy of release* as envisioned in the Nebraska statutory scheme; rather, our Legislature has invested the Parole Board with almost total discretion in such matters.

Averhart, 618 F.2d at 482. On the basis of that state court interpretation, the court held that no constitutional liberty interest was created by the Indiana parole statute. *Averhart*, 618 F.2d at 482.

The remaining circuit court decisions establish that the Nebraska and federal system stand alone because of their unique mandatory natures. *See Stanton v. Wainwright*, 665 F.2d 688 (5th Cir. 1981) (Florida parole system did not give rise to a liberty interest because it did not provide for any specific conditions which would mandate an inmate's release until the commission approve[d] an effective parole release date."); *Williams v. Briscoe*, 641 F.2d 274 (5th Cir. 1981) (Texas parole system did not give rise to a liberty interest because an applicant for parole "must have both the parole board's favorable recommendation and the approval of the Governor,

neither of which is statutorily granted as a matter of right."); *Schuemann v. Colorado State Bd. of Adult Parole*, 624 F2d 172 (1975) (10th Cir. 1980) (Colorado parole system did not create a liberty interest because "the Colorado statute gives the Board broad discretion and does not require the granting of parole upon a showing of any particular facts."); *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979) (Ohio parole system did not create a liberty interest because the standard that "Parole Authority may grant parole if 'in its judgment there is a reasonable ground to believe' that paroling the inmate would further the interests of justice and be consistent with the welfare and security of society" did not "mandate a presumption of parole release."); *Boothe v. Hammock*, 605 F.2d 661 (2nd Cir. 1979) (New York parole system did not create a liberty interest because parole was "committed to the discretion of the Parole Board" and "unlike Nebraska's [did] not establish a scheme whereby parole whall be ordered unless specified conditions are found to exist."); *Slocum v. Georgia State Bd. of Pardons and Paroles*, 678 F.2d 940 (11th Cir. 1982) (Georgia parole system does not create a liberty interest even though many of the statutory provisions structuring the Board's exercise of discretion are mandatory); *Shirley v. Chestnut*, 603 F.2d 805 (10th Cir. 1979) (Oklahoma parole system did not create a liberty interest because there are "no written and formally established factors to be considered" and the only statutory guidance is that the board act "as the public interest requires."); *Accord, Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979); *See also Block v. Potter*, 631 F.2d 233, 242-43 (Seitz, C.J., dissenting); *United States ex rel. McCalvin v. Irving*, 504 F.Supp. 369 (C.D.Ill. 1980); *Johnston v. Alabama Pardon and Parole Bd.*, 530 F.Supp. 589 (M.D.Ala. 1982); *Houser v. Morris*, 518 F.Supp. 873 (N.D. Ga. 1981); *Robinson v. Mabry*, 476 F.Supp. 1022 (E.D.

Ark. 1979); *Austin v. Armstrong*, 473 F.Supp. 1114 (D. Nev. 1979); *Campbell v. Montana State Bd. of Pardons*, 470 F.Supp. 1301 (D.Mont. 1979).

This is the same analysis applied to questions of liberty interests in other contexts. *E.g., Vitek v. Jones*, 445 U.S. 480, 489-90 (1980) (liberty interest arose from statutory provision that prisoner would not be transferred to mental hospital absent determination that prisoner suffers from a mental disease); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (liberty interest in statutory guarantee of grant of good time credits absent serious misbehavior); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (liberty interest in remaining free on probation); *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972) (liberty interest in entitlement to remain free on parole as long as parolee abides by terms of parole). *See Neal v. Secretary of the Navy, Etc.*, 639 F.2d 1029, 1041 n.12 (3d Cir. 1981) (collecting and commenting upon the foregoing decisions).

Furthermore, in *Connecticut Bd. of Pardons v. Dumschat*, ... U.S. ....., 101 S.Ct. 2460 (1981), this Court found no liberty interest in the Connecticut law on commutation of prison sentences. The Court stated, "The Connecticut commutation statute, having no definitions, no criteria, and no mandated 'shalls', creates no analogous duty or constitutional entitlement." *Dumschat*, ... U.S. at ....., 101 S.Ct. at 2465. Finally, in *Meachum v. Fano*, 427 U.S. 215 (1976), this Court found that a prisoner had no liberty interest in remaining at a particular prison where the prison transfer decisions were to be made:

> [F]or a variety of reasons and often involv[ing] no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.

Meachum, 427 U.S. at 225. Indeed, this Court likened transfer decisions to parole decisions generally in *Greenholtz*. *Greenholtz*, 442 U.S. at 10. Furthermore, it mat-

tered not that the transfer decision "visited a 'grievous loss' upon the inmate" absent a constitutional entitlement. *Moody v. Daggett*, 429 U.S. 79, 88 n.9 (1976) (quoting *Meachum*); *Jago v. Van Curen*, ... U.S. ....., 102 S.Ct. 31, 33 (1982). *Cf., Solomon v. Benson*, 563 F.2d 339, 342 (7th Cir. 1977). *See generally Anderson v. Winsett*, ... U.S. ....., 101 S.Ct. 891 (1981) (White, J., dissenting); *Pugiliese v. Nelson*, 617 F.2d 916, 921-25 (2d Cir. 1980); *Griffeth v. Detrick*, 603 F.2d 118, 120-21 (9th Cir. 1979), *cert. denied* 445 U.S. 970 (1980); *Young v. Hunt*, 507 F. Supp. 785 (N.D.Ind. 1981); *Marciano v. Coughlin*, 510 F. Supp. 1034, 1037 (E.D. N.Y. 1981); *Martino v. Gard*, 526 F.Supp. 958, 960 (E.D. N.Y. 1981).

In this case, the Seventh Circuit recognized that:

> [B]y stating its rule in the negative Illinois has left open the possibility that its statute can also be reasonably read as not creating an expectancy of release on parole. *It can be read as merely a statement by the Illinois legislature as to when the Board must deny parole, leaving the Board free in the absence of those conditions to exercise its own discretion in deciding whether or not parole should be granted.* Under this construction, the statute would not create a legitimate expectation of release and due process considerations would not apply. *See Averhart v. Tutsie*, 618 F.2d 479 (7th Cir. 1980) (where legislature has invested Parole Board with almost total discretion in such matters, inmate had no legitimate expectation of release).

669 F.2d at 1185 (emphasis added).

At this point, the Court should have stopped and deferred to an unbroken line of Illinois case law spanning nearly 90 years and held that there is no expectation of parole in Illinois. Instead, the Court went on to not just distinguish *but reject* the Illinois case law in a footnote[2]

[2] "Although the Illinois courts have frequently noted that, as a general matter, parole is a matter of grace and clemency

(Footnote continued on following page)

that can best be described as nothing short of amazing. At the very least, if the Court believed Illinois case law to be "inconclusive it should have required the inmate to present his claim in the state courts through mandamus. *Duckworth v. Serrano*, ... U.S. ....., 102 S.Ct. 18 (1981). *Duckworth* would allow the inmate to avoid exhaustion only if the state case law indicated that it would be futile. On the other hand, a finding that exhaustion would be futile would be authoritative on the question of whether the state has created an expectancy of parole and would have precluded the court of appeals from reaching a decision on the merits of Scott's claim. *See Averhart*, 618 F.2d 479 (7th Cir. 1980).

Nonetheless, with this obstacle out of the way, the court went on to rely on the Council Commentary in Illinois

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[2] *continued*

rather than of right, *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 337-38, 259 N.E.2d 33 (1970); *People v. Hawkins*, 54 Ill.2d 247, 252, 296 N.E.2d 725 (1973); *People ex rel. Weaver v. Longo*, 57 Ill.2d 67, 309 N.E.2d 581 (1974), they have not interpreted the scope of the interest, if any, this particular provision was intended to afford Illinois state prisoners. The Illinois Appellate Court came closest to doing so in *People ex rel. Tucker v. Kotsos*, 42 Ill.App.3d 812, 818, 1 Ill.Dec. 516, 356 N.E.2d 798 (1976). In comparing a parole release determination with a trial court's decision of whether to grant probation, the court stated: "Similarly, with parole, the Parole and Pardon Board has great discretion in determining who shall be granted parole. However, the Board must not parole a person eligible for parole if it is determined that there is a substantial risk that he will not conform to reasonable conditions of parole, his release at that time would deprecate the seriousness of his offense or promote disrespect for the law." *While this language seems to indicate that the second interpretation of section 1003-3-5(c) under which no liberty interest is created is correct, we do not find it conclusive since it is not clear on the issue and appeared only as dicta in the court's opinion. Compare Averhart v. Tutsie, supra* (Where Indiana Supreme Court had expressly held that state's parole release statute was unlike Nebraska's in that it created no expectancy of release, this court is bound by that interpretation)". 669 F.2d at 1185, fn. 4. (emphasis added).

Smith-Hurd Annotated[3] and The Rules of the Illinois Prisoner Review Board[4] to hold that the Illinois parole scheme created an expectation of parole. The petitioners respectfully suggest that, while busy looking under the leaves, the court of appeals missed the forest.

A review of parole in Illinois demonstrates that there is nothing *mandatory* about the Illinois parole scheme except the limitation on the board's ability to *grant* parole which is significantly different from placing a limitation on the ability to *deny* parole as in the Nebraska statute considered in *Greenholtz*. The first Illinois Parole Act was passed in 1895. *See George v. The People*, 169 Ill. 447 (1897). That act and all subsequent acts have contained provisions related to procedures before the Board. These provisions have always been viewed as creating mandatory duties on the Board. *People v. Kinney*, 30 Ill.2d

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[3] "The Board should state one or more of the reasons listed in subparagraph (c) as the basis for its decision denying parole as required by subparagraph (f). Additional reasons may also be stated. Ill. Ann. Stat. ch. 38 §1003-3-5, pp. 87-88 (Smith-Hurd). This language indicates that, while other reasons may also be given for the denial, such reasons are to be additional to, and not in place of, the statutory reason or reasons relied upon. The implication is that parole must be granted where none of the specified reasons for denial are found to exist.[5] 669 F.2d at 1185. Footnote 5 reads:

> "[5]. Although the word 'Additional' might also be read as meaning alternative, we are unpersuaded that this is the intended meaning in this context." 669 F.2d at 1185, fn. 5.

[4] The Rules of the Illinois Prisoner Review Board is a document which is periodically revised. The Court did not inform the parties which edition it may have relied on in reaching its conclusions and how this edition may have varied from prior subsequent editions. The "rule" cited first appeared in a 1978 version of the Rules. More importantly, however, the court did not consider the effect as to scope or finality of the rules on the Board. An argument based on the Rules was carefully considered and rejected by Judge Prentice H. Marshall in *Sanders v. Illinois Prisoner Review Bd.*, No. 80 C 963 (N.D. Ill. January 13, 1982) (appeal pending). See Appendix F.

201, 195 N.E.2d 651 (1964). The mere existence of mandatory provisions or even provisions which directly structure the Board's discretion, however, does not give rise to an expectation of parole, where those provisions do not limit the Board's discretion in denying parole. *See Slocum v. Georgia State Bd. of Pardons and Paroles*, 678 F.2d at 941.

Illinois courts have consistently told Illinois inmates that their indeterminate sentence is for the full term fixed by law for the crime. *People ex rel. Castle v. Spivey*, 10 Ill.2d 586, 592, 141 N.E.2d 321 (1957). An Illinois prisoner has no right to demand his discharge before the expiration of the maximum term of his sentence. There is no legal right to parole in Illinois. It is a matter of grace and executive clemency. That was the law in Illinois prior to the enactment of Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c). *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 338, 259 N.E.2d 33 (1970).

That was, and still is, the law in Illinois after the enactment of §1003-3-5(c). *People v. Hawkins*, 54 Ill.2d 247, 252, 296 N.E.2d 725 (1973); *Harris v. Irvin*, 90 Ill. App. 3d 56, 60, 412 N.E.2d 976 (5th Dist. 1980). ("Appellant concedes, *as he must*, that he has no constitutional right to parole") (emphasis added).

At issue in *Harris*, as in *Scott* was the Board's discretionary denial of parole. 90 Ill. App. 3d at 56. *Harris* is the most recent of the Illinois parole cases which began with *George* and which have interpreted Illinois parole laws and have always told Illinois' prisoners that their parole rests, as a matter of grace, in the discretion of the Board. *See People v. Nowak*, 387 Ill. 11, 55 N.E.2d 63 (1944).

Petitioner believes that 85 years of Illinois case law interpreting Illinois statutes should be sufficient to convince the federal courts that Illinois does not give inmates

any expectation in parole release and that the federal courts should refrain, as do the Illinois courts, from meddling in the Prisoner Review Board's discretionary realm. Nonetheless, should the Court doubt the correctness of the state court's interpretation of what the Illinois legislature was seeking to achieve through §1003-3-5(c), the petitioner respectfully suggests that a review of the floor debate should settle the matter.

Section 1003-3-5(c) was part of Public Act 77-2097. The Act was part of the proposed Unified Code of Corrections. *Ill. Rev. Stat.* 1973, §1001-1-1 *et seq.* On the floor of the Illinois Senate on May 9, 1972, the following insight was provided concerning the intent of the new Code.

SENATOR PARTEE:

> Well, Mr. President and members of the Senate, I simply want to call attention to the members of the Senate, that this is the kind of herculean effort that the Senate is capable of. I think certainly that those men . . . an' others on [sic] the Judiciary Committee itself is entitled to our praise an' our gratitude for having so studiously applied themselves to what was a very difficult subject, some 485 bills in all . . . ah . . . many of which . . . ah . . . seemed to be almost impossible an' they've worked long an' tedious hours an' they have put this package together in a form which I now find to be acceptable to practically everybody, while at the same time not destructive of the concept which is involved here. . . .

Transcript of Proceedings of the Illinois Senate, May 9, 1972, pp. 43-44.

SENATOR GRAHAM:

> I met with Al Scott an' some of the fellows last year in an effort to tone down what I thought was an unbearable situation imposed by the original bills upon the wardens of the penitentiaries. Now, mem-

bers of the Senate, I might be willing to suggest to you that every liberal unit in the country has been interested in these an' some conservatives. . . . Some of the wardens were extremely concerned about these bills an' as Senator Partee said, just recently, the States Attorneys an' the parole system in Illinois were concerned too. We are facing probably an era in correctional institutions whereby with the influence of the American Civil Liberties Union an' other dogooders that we are supposed to adopt the attitude everybody incarcerated in our prisons is there because they skipped Sunday School. Now, I can tell you having gone through an' talk with . . . Bill Arends [sic] an' Speck an' some of those other fellows they didn't skip Sunday school to get where they are now, but despite that, we have moved into a new era in correctional institutions an' the addressment [sic] to the real attempt for the rehabilitation of prisoners. Contained within these bills, which are very complicated, are many provisions that some of you will never read an many of you don't care much about. But if you have fears as to the complications that may arise from the passage of these bills you can be discomforted by the fact that the Judiciary has long been doing our job for us as you know. Like to call your attention to one of their interferences into the penal institutions last year, when a judge in Chicago ordered the release of three prisoners from Sheridan because they were being confined a little too tightly, one of 'em was in for murder, one for double murder, an' one for rape 'an manslaughter, but he demanded we turn 'em loose. Now, I have a firm conviction that if these bills are not enacted an' I think they will be, the courts, say once again is gonna be meddling with the business of the State of Illinois which should be left to the General Assembly.

Id. pp. 45-46.

Had the Illinois legislature wanted to change the scheme of parole in Illinois to limit the Board's authority to deny parole and provide inmates with the expectation of release found in the Nebraska statute, it certainly could have. *But it did not.*

The Illinois legislature carefully chose language which limits *only* the Board's ability to *grant* parole. Clearly, in light of Senator Graham's remarks, there was no legislative intent to invite the federal courts to meddle in the discretion of the Board. Indeed, limiting the Board's ability to grant parole further decreases the reasonableness of an inmate's claim of an expectation of parole. It does not, on the other hand, limit the Board's broad discretion in denying parole. Nor has the Board interpreted the legislation as a limitation on its ability to deny parole. For example, in 1977, inmate William Witherspoon (*See Witherspoon v. Illinois*, 319 U.S. 510 (1968)) was denied parole because he was "an habitual offender" a classification clearly not explicitly covered by §1003-3-5(c). See Appendix M. It is fundamental that an administrative body's interpretation of a relevant statute is entitled to great deference. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Here, the court of appeals not only did not defer to the administrative agency's interpretation, it failed to even inquire as to the Prisoner Review Board's interpretation of §1003-3-5(c).

The Seventh Circuit's analysis in *Scott*, seeking to determine legislative intent without consideration of the state court decisions, the mood of the legislature at the time it enacted §1003-3-5(c) or the interpretation of the agency involved, was contrary to what a due process analysis involving a state parole law and statutory construction questions should have followed. Rather, the court should have first looked to the extent of discretion that the legislature and state courts allow to determine whether a reasonable expectation of parole exists. The

answer to that question determines whether due process attaches. *Greenholtz, supra.*

In Illinois, the answer to that question is that state courts have allowed unbridled discretion. From that basis, the court of appeals should have concluded that no reasonable expectation of parole, and thus no protected liberty interest, is involved in the Illinois parole scheme.

This Honorable Court should therefore grant the Petition for a Writ of Certiorari and uphold the state courts' analysis of the Illinois parole scheme.

II.

THE HOLDING OF THIS CASE IS IRRECONCILABLE WITH THE SEVENTH CIRCUIT'S RECENT HOLDING IN *WELSH v. MIZELL*, AS *WELSH* RENDERED THE STANDARD ANALYZED BY THE COURT IN REACHING THE INSTANT DECISION INAPPLICABLE TO THIS PETITIONER.

In this case, the Seventh Circuit found that the Illinois Parole release statute provides parole-eligible inmates with a constitutionally protected liberty interest. 669 F.2d at 1190. In reaching this conclusion, the court relied on its interpretation of the provisions of *Ill. Rev. Stat.* 1979, ch. 38, sec. 1003-3-5(c); the Council Commentary to that section (*Ill. Ann. Stat.* ch. 38, sec. 1003-3-5, pp. 87-88 (Smith-Hurd)); and Rule V[5] of the Rules of the Illinois Prisoner Review Board. 669 F.2d at 1188, 1189.

The Court then remanded the matter for a determination as to whether the Board uniformly applies Rule V and Section 1003-3-5(c)(2) to all persons convicted of murder. 669 F.2d at 1911.

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[5] The Court did so, apparently without considering the implication of Rule IV, which provides the factors available for consideration in a parole decision, or the finality or scope of the rules over board determinations.

In *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982) (Petition for a Writ of Certiorari pending, No. 81-2105), the same court had held that the Prisoner Review Board must apply the statutes and regulations in effect at the time of a petitioner's conviction in making a parole decision. 668 F.2d at 332.

William Scott was convicted in 1968. Petition at 1; 668 F.2d at 1187, fn. 1. The current language of *Ill. Rev. Stat.*, ch. 38, sec. 1003-3-5 was enacted in 1973. The Council Commentary, cited at 669 F.2d 1189, was also added in 1973. Rule V of the Rules of the Illinois Prisoner Review Board first appeared in the form cited on page 1189-90, n. 6, in the 1978 version of those rules.

The *Welsh* decision mandates that this petitioner's claim be analyzed under the criteria in effect at the time of his conviction. Yet, the entire analysis and order on remand in this case is based not on the criteria in effect in 1968, but rather, on criteria established since 1973. By deciding this case on the basis of language that, according to *Welsh*, can never be applied to this petitioner, the court has adopted a position which is irreconcilable to that taken in *Welsh*.

In analyzing the petitioner's claim under statutes and regulations enacted since his conviction, and in ordering the district court to reconsider his claim under those same criteria, the court has either disregarded the mandate of *Welsh* or this Court's longstanding prohibition on interpreting statutes to determine constitutional issues when no constitutional analysis is required to resolve the case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348, 56 S.Ct. 46C (1936) (Brandeis, concurring).

This Court should grant the Petition for a Writ of Certiorari to resolve the confusion resulting from the court of

appeals zeal to scrap and then reconstruct the Illinois Parole scheme.[6]

III.

THE PROCEDURAL HISTORY OF THIS CASE REQUIRES, AT THE VERY LEAST, A REMAND TO THE COURT OF APPEALS WITH DIRECTIONS THAT THE COURT ALLOW BOTH PETITIONER AND RESPONDENT THE OPPORTUNITY TO FULLY BRIEF AND ARGUE THE IMPORTANT ISSUES CONTAINED IN THIS CASE.

The procedural history of this case is marred by the court of appeals' assumption of an advocate's role and by the appearance of a manipulation of federal and local rules of procedure (for example, allowing an anticipatory vote by a deceased former member of the court of appeals to defeat a petition for rehearing *en banc*), thus preventing the People of the State of Illinois from ever properly presenting their position on the important issues contained in this case.

The procedural history of this case begins with Circuit Rule 35 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit which provides for the disposition of certain classes of cases through unpublished orders.[7]

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[6] These facts were called to the attention of the court of appeals in the Petition for Rehearing filed on February 23, 1982. As noted in the Statement of Facts, said Petition was denied on June 18, 1982.

[7] Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit Promulgated pursuant to Resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of the circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per

(Footnote continued on following page)

Shortly after this Court's opinion in *Greenholtz*, the United States District Courts in Illinois began uniformly

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[7] *continued*

curiam. Orders shall not be published and opinions shall be published.

* * *

(2) Unpublished order:

* * *

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

* * *

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall

* * *

not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) by any such court for any purpose.

(c) *Guidelines for Method of Disposition.*

(1) Published opinions.

A published opinion will be filed when the decision:

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

* * *

(2) Unpublished orders.

When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order.

denying review of Illinois prisoners' claims concerning the alleged denial of due process rights in parole denial proceedings after finding no expectation of parole had been created by Illinois law. *See e.g., Walker v. Irving*, No. 79 C 623 (N.D. Ill. October 18, 1979); *Parisie v. Irving*, No. 80 C 131 (N.D. Ill. January 22, 1980); *Burns v. Irving*, No. 80 C 337 (N.D. Ill. January 24, 1980); *Sanders v. Illinois Prisoner Review Board*, No. 80 C 963 (N.D. Ill. January 13, 1981). See Appendices F, G, H.

Indeed, as recently as December, 1981, the court of appeals used a Rule 35 order to approve this position. That brief order read:

> Plaintiff filed his civil rights suit based on 42 U.S.C. Section 1983 alleging that defendant had violated his constitutional rights by arbitrarily denying him parole. The trial court denied him leave to proceed in forma pauperis on his complaint. The district court relied on *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 42 U.S. [sic], (1979) in holding that the Illinois statutory provisions governing parole release for prisoners serving indeterminate sentences do not create an entitlement interest so that plaintiff need be accorded due process protections in parole release proceedings. The trial court denied plaintiff leave to proceed in forma pauperis on the ground that the complaint was frivolous.
>
> On May 21, 1980 we granted plaintiff leave to proceed on his appeal from this dismissal order. On the basis of complete review of the briefs and record we conclude that the order of the district court was sound. Thus, the dismissal order is hereby affirmed.

Burns v. Irving, No. 80-1429 (December 8, 1981). See Appendix I.

Furthermore, in *United States of America ex rel. Parisie v. Irving*, No. 80-1240 (July 8, 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 168 (1980), the court of appeals used an unpublished order to deny the petitioner leave to

raise a claim identical to the one here *in forma pauperis*. The case was dismissed after the petitioner failed to pay any docketing fee. The petitioner then brought a petition for a writ of certiorari alleging that by denying him leave to appeal *in forma pauperis* the Seventh Circuit denied him access to the courts. Certiorari was denied by this Court.

The Seventh Circuit did take an opposite approach in *Newbury v. Irving*, No. 80-2352 (July 23, 1981) (See Appendix J), where it remanded a case for further consideration after the district court had denied leave to proceed with a 42 U.S.C. §1983 action *in forma pauperis*. That order merely stated that counsel on appeal had demonstrated that a rational argument could be made for finding a protected liberty interest and that the district court should have listened to that argument. However, the *Burns* decision, coming several months after the *Newbury* order, indicates that the court had, apparently, not been impressed for long with the *Newbury* arguments.

The only other authority from the Seventh Circuit for existence of a due process interest prior to the decision in this case was the pre-*Greenholtz* decision in *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976). *Richerson* was, however, as the Seventh Circuit noted in this case, based upon a rationale which "*Greenholtz* specifically rejected,"; i.e., that by holding out the possibility of parole the state created a liberty interest in parole. *United States ex rel. Scott v. Illinois Parole and Pardon Bd.*, 669 F.2d 1185 at 1187. The *Richerson* decision is therefore no authority for the question of whether a liberty interest is created by the parole system now under consideration.

It was in this setting that William Scott filed his *pro se* brief on November 19, 1980, alleging, *inter alia*, that he was being denied parole in violation of the due process

clause of the Fourteenth Amendment to the United States Constitution. The most recent of the four cases cited in his brief in support of the proposition was *Wolff v. McDonnell*, 418 U.S. 554 (1974). No mention was ever made of *Greenholtz*, despite the fact that the district court had analyzed the Illinois parole law in light of *Greenholtz* and had found no protected liberty interest. *United States of America ex rel. Scott v. Illinois Parole and Pardon Board*, No. 79 C 860 (August 27, 1979). See Appendix D. On December 3, 1980, the Seventh Circuit denied the petitioner's motion for appointment of counsel.

On January 5, 1981, the respondents filed their brief which only summarily highlighted what the federal courts in Illinois had consistently, *to that point*, indicated what the law was. The petitioner responded to this argument in his Reply Brief by asserting that the Parole Board was violating the Constitution of the State of Illinois (1970), art. I, sec. 11. Because the Seventh Circuit had deemed the case to be of insufficient merit to appoint counsel, there was no oral argument.

More than a year after the filing of the Reply Brief the Seventh Circuit rendered its decision in the form of a fourteen page opinion that could have only have resulted from the assumption of an advocate's role by the court. The opinion addresses theories and cases that were neither raised nor considered by the parties. The opinion anticipated arguments that the State might have raised had there been some reason to believe the law was unsettled and then systematically rejected each. Unfortunately, the opinion chose to ignore the most compelling reasons for finding that no protected liberty interest exists.

As improper as the court's action was, it was not beyond being rectified by merely returning the advocate's

role to the parties for the purpose of a rehearing. The court, however, chose not to allow the petitioners to state their case. The manner in which this was accomplished is just as troubling as the procedural history of the opinion.

On March 23, 1982, the Court appointed Mr. Gary Palm, a Professor of Law at the University of Chicago Law School to represent the respondent for the purpose of responding to the Petition for Rehearing and Suggestion for Rehearing *en banc*. Judge Richard Posner, a new appointee to the Seventh Circuit and former Professor of Law at the University of Chicago Law School, subsequently chose not to participate in the consideration of the Petition for Rehearing. Judge Posner's failure to participate was tantamount to a vote against rehearing since the vote required for rehearing *en banc* is not a majority of the members voting but a majority of the active members of the court. Rule 35(a), Federal Rules of Appellate Procedure.

After the denial of the petition for rehearing, the petitioners filed a motion to reconsider. In that motion, petitioners pointed out that if Judge Posner did not participate because of his former association with counsel for the respondent then the court, as a whole, had improperly cast the first "No" vote on the Petition for Rehearing when Mr. Palm was appointed for the purpose of responding to the petition. The court denied the motion to reconsider without explanation and without submitting the motion to Judge Posner.

More incredibly, the dissent from the order denying the Petition for Rehearing indicates that the Court relied on an anticipatory vote by a deceased member of the court to block a rehearing *en banc*. 669 F.2d at 1192. This, of course, is improper since only the votes of *active* members of the court may be considered on a petition for rehearing. Rule 35(a), Federal Rules of Appellate Pro-

cedure. When the vote on the petition for rehearing was completed on May 20, 1982, former Judge Sprecher was not an active member of the court (having died, after an extended period of hospitalization, on May 15, 1982) and it was improper for the court of appeals to consider his anticipatory vote which had been "recorded" some nine weeks before any vote was formally requested and before the petition was fully briefed including the submission of substantial supplemental authority submitted by the petitioners.

Frankly, the petitioners have no idea why the court of appeals would go to such unusual lengths to deny the opportunity to even address the arguments that seem to have been developed at leisure by the panel which decided this case. This is particularly abhorrent in view of the substantial impact of this case on the Illinois scheme of parole and the caseload of the federal courts in Illinois.

These procedural wrongs can only be corrected by providing the parties the opportunity to fully address the significant issues raised by the Seventh Circuit after the filing of the parties' initial briefs. These issues were issues that the petitioners had no reason to suspect would arise in view of the known decisions, albeit, decisions under Circuit Rule 35, which the court of appeals had consistently rendered since *Greenholtz* was decided. While Circuit Rule 35 states that unpublished orders have no precedential value, repeated orders telling a particular party what the law of the Circuit is on a particular question, have the effect of precedent on the manner in which that party can reasonably be expected to conduct itself in the future. The response to the respondent's brief in the court of appeals was adequate and reasonable *under the circumstances*. The petitioners had no way of predicting that the court of appeals would, *sua sponte*, assume an advocate's role and decide the case in a manner totally inconsistent with prior decisions of that court.

In view of the foregoing procedural history, it is submitted that, at the very least, the judgment in this case should be vacated and the case remanded to the court of appeals with directions to allow appointed counsel, as well as the petitioners, the opportunity to fully brief and argue the important issues contained in this case.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

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September 16, 1982